of this estate. It might be construed to refer to the value of the entire personal estate, including the specific bequests. Inasmuch, however, as counsel for the nephews and nieces stated in argument that the purpose of fixing the value was to show the jurisdictional amount necessary on appeal, I assume that the third paragraph in the agreement refers to the general residuum. But in any event, regardless of the question of value, the fact that the testratrix enumerates in the codicil the same property which she had formerly directed to be differently applied raises, as we have already seen, a plain and irreconcilable conflict between the codicil and the residuary clause in the will. In the face of this conflict, there is no other legal course open than to give the general residuum of the estate to W. B. Clark."

The decree complained of, which carries into effect the conclusion reached in the foregoing opinion, must be affirmed.

Affirmed.

SMITH v. STANLEY.

Sept. 9, 1912.

[75 S. E. 742.]

1. Appeal and Error (§ 171*)—Questions Reviewable—Questions Not Raised in Trial Court.—Where a trial in ejectment proceeded on the theory that it was a case of common source of title, and defendant, in a requested instruction, conceded that if plaintiff traced his title back to a grantor and showed a present right of possession he established a prima facie case, defendant, on plaintiff's writ of error to review a judgment of dismissal, could not raise the question that the parties did not derive title from a common source.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*

2. Evidence (§ 472*)—Opinion Evidence—Question for Jury.—Where, in ejectment involving the location of a disputed boundary, a surveyor of the lands claimed by plaintiff, who had made a plat thereof which was in evidence, could not testify, after stating how he had located a part of the disputed line, if there was any other rule of surveying in locating a line than that adopted by him, since the question whether the line was properly located was for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

3. Witnesses (§ 269*)—Cross-Examination—Extent.—A party

*For other cases see same topic and section NUMBER in Dec Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

cross-examining a witness as to matters other than those stated in the examination in chief should make the witness his own witness, calling him as such in the progress of the cause.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

4. Trial (§ 84*)—Evidence—Objections—Sufficiency.—A general objection to a question asked a witness on cross-examination is not sufficient to raise the objection that the question calls for matters not stated in the examination in chief; but, where the objection is based on that fact, it should specifically so state.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.*]

5. Witnesses (§ 226*)—Appeal and Error (§ 971*)—Examination of Witnesses—Discretion of Court.—The manner of examining witnesses is largely in the discretion of the trial court, and its action will not be disturbed in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 792-797; Dec. Dig. § 226;* Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.*]

6. Evidence (§ 274*)—Declarations as to Rights in Real Estate—Admissibility.—A statement of what a person had said as to where a boundary line was located is not admissible in a controversy between strangers to the title, in the absence of anything to show that the person was a surveyor or chain carrier at the making of the original survey, or that he was the owner of the land or of any adjoining land calling for the same boundary, or that he had been engaged as a processioner of the land, or that his situation was such as to render it his duty or interest to make diligent inquiry and obtain information as to the facts, or that he claimed any title

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.*]

7. Evidence (§ 519*) — Opinion Evidence — Expert Testimony. — Where, in ejectment involving the location of a disputed boundary, there was evidence that a former owner had said that when he had his claim surveyed he did not survey all of it, but only had the heads of the bottoms run out, as he did not wish to pay taxes on more land than he could farm, a witness, testifying that the land was hilly and rocky, could not testify as to whether it was such land as a man running out the heads of bottoms for a farm, who did not want to pay taxes on more land than he could farm, would include in his survey, since the matter was not the subject of expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2328; Dec. Dig. § 519.*]

7½. Evidence (§ 519*)—Opinion Evidence—Expert Testimony.—

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

The opinions of surveyors examined as witnesses in an excitement, action are competent and admissible only as to the age of marks on timber, as to which alone they are qualified as experts to give an opinion.

8. Evidence (§ 274*)—Title to Land—Declarations.—In ejectment involving the location of a disputed boundary line, a witness was properly permitted to testify as to an admission by a former owner, through whom a party claimed, to the effect that the former owner did not claim the lines as claimed by such party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.*]

9. Evidence (§ 474½*)—Opinion Evidence—Expert Testimony.—The court in ejectment may properly refuse to permit a witness to give his opinion as to whether a former owner, under whom a party claimed, would or would not have sold land in dispute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 474½.*]

10. Boundaries (§ 35*)—Evidence—Admissibility.—In ejectment involving the location of a disputed boundary, evidence that a prior owner, under whom a party claimed, had exercised acts of ownership to a line with the knowledge of and without objection from a former owner, under whom the adverse party claimed, was competent to show that both the former owners regarded the line between them as a correct line and as showing adversary possession of the parties and those claiming under them.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153-159, 163, 165, 177-183; Dec. Dig. § 35.*]

11. Appeal and Error (§ 1048*)—Examination—Leading Questions.—Ordinarily, the permitting of a leading question asked a witness is not ground for reversal, especially where the witness has stated the facts to which the leading question relates.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

12. Evidence (§ 230*)—Admissions—Question for Jury.—In ejectment involving the location of a disputed boundary line, a party may prove the admission of a former owner, under whom the adverse party claimed, as to the location of the line, as against the objection that the admission of the former owner was made under a mistake, since the question of mistake was for the jury and not for the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.*]

13. Boundaries (§ 36*)—Evidence—Admissibility.—Where, in ejectment involving the location of a disputed boundary, there was evidence that a former owner, under whom a party claimed, had recognized the southern boundary line of his land as correctly de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

scribed in a deed, and that such line had been treated by the former owner as the true dividing line, the deed was properly received in evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.*]

14. Evidence (§ 370*)—Indorsements on Deeds—Admissibility.—Where an indorsement on a deed was signed by the grantor by his mark and was witnessed by a subscribing witness, who was dead, and three persons testified to the handwriting of such subscribing witness and stated that they were familiar with his handwriting, and that the name of the subscribing witness was in his own handwriting, and two of them thought that the name of the grantor and the words "his mark" were also in the handwriting of the subscribing witness, there was sufficient proof of the execution of the indorsement to authorize its admission in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1559-1579, 1592; Dec. Dig. § 370.*]

15. Evidence (§ 357*)—Instruments Admissible in Evidence—Letters.—Where letters were not written by or to a party nor by or to any one under whom he claimed in ejectment, the letters were properly excluded when offered by the adverse party, and their contents, if relied on by the adverse party, must be proved orally or by deposition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1492-1499; Dec. Dig. § 357.*]

16. Trial (§ 260*)—Instructions—Construction.—Where the instructions, when considered as a whole, as they must be, fairly submitted the case, the refusal to give other instructions embodying correct propositions of the law applicable to the facts was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

17. Trial (§ 314*)—Coercing Verdict—Instructions.—Where the third jury, after two mistrials because of inability of the jurors to agree, were given the case on Saturday, and, on being unable to agree, they were adjourned over until Monday, the action of the court in charging the jury, before they retired on Monday to consider the verdict, that it was their duty to agree if they could, and that a juror should not hold out against other jurors on controverted questions unless convinced that he was right, but the jurors should make concessions and try to agree if they could do so without violating their oaths or consciences, was not objectionable as coercing a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 747, 748; Dec. Dig. § 314.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

18. Trial (§ 312*)—Instructions.—Where, in ejectment involving the location of a disputed boundary, the jury returned to the court-room, and one of them asked the court "what possession would be sufficient for the jury to believe or find that the defendant was entitled to the land," the statement by the court that if a man lived on his land or any part thereof and claimed to the extent of his boundary, and no part of it was in the possession of anyone else, his possession extended to the boundaries called for in his deed, and if there was an express agreement between former owners, under whom the parties claimed, and the parties exercised acts of ownership up to the agreed line, it was sufficient to establish the line, was in reply to the juror's question and correctly stated the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 744, 745; Dec. Dig. § 312.*]

Error to Circuit Court, Dickenson County.

Ejectment by M. T. Smith against H. E. Stanley. There was a judgment of dismissal, and plaintiff brings error. Affirmed.

Skeen & Skeen and *Sutherland & Sutherland,* for plaintiff in error.

W. H. Rouse and *Vicars & Peery,* for defendant in error.

BUCHANAN, J. This is an action of ejectment brought by the plaintiff in error against the defendant in error to recover a small parcel of land.

The rights of the parties depend upon the location of a disputed boundary line. Both parties claim under conveyances from George A. Warder. In February, 1888, Warder conveyed to Rainwater Ramsey a tract of land containing, as stated in the deed, about 250 acres, known as the "Wm. Hale" land, and upon which Ramsey had resided since about the year 1868. The defendant acquired Ramsey's interest in the land sued for. In April, 1888, Warder conveyed two contiguous parcels of land to Wm. Green, one known as the "Elias Green tract," and the other known as the "Aaron Wright tract." Along the controverted lines the deed to Wm. Green calls for corners and lines on the Wm. Hale (Ramsey) land theretofore conveyed. The plaintiff claims under William Green.

There was a verdict and judgment in favor of the defendant in the trial court, and to that judgment this writ of error was awarded.

The plaintiff took 18 bills of exception to the action of the court upon the admission and rejection of evidence; and offered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

27 instructions, 2 of which were given as offered, 4 amended and as amended given, and the others refused. The plaintiff excepted to the action of the court in refusing and amending his instructions, and also to its action in giving 7 instructions asked for by the defendant, to 1 given orally by the court in answer to a question asked by one of the jurors, and to the refusal of the court to set aside the verdict.

The record is voluminous, much of the evidence parol and more or less conflicting. If the case was properly submitted to the jury, it is clear that the court did not err in refusing to set aside the verdict.

[1] The plaintiff did not trace title to the commonwealth, and the defendant insists that, unless it appears that both parties derived title from a common source, it will be unnecessary to consider any other question in the case. It is conceded that both parties claim under a common grantor, George A. Warder; but the defendant denies that the conveyance of two distinct parcels of land, one to one grantee and the other to another grantee, although the deed to the junior grantee calls for the lines of the senior grantee, shows that the parties derived title from a "common source" within the meaning of that term.

Whatever may be the merits of that contention, we do not think it can be raised in this court. In the trial court both parties proceeded upon the theory that it was a case of common source of title. By the defendant's instruction No. 2 it is conceded that, if the plaintiff traced his title back to Warder and showed a present right of possession to the land sued for, he had made out a prima facie case. This, of course, could not be true unless Warder was regarded as the common source of title.

[2] Thacker, a surveyor, who has surveyed the lands claimed by the plaintiff and made a plat thereof which was in evidence, after testifying how he had located a part of the disputed line, was asked if there was any other rule of surveying in locating such a line than that adopted by him. The witness was not permitted to answer the question, and this action of the court is assigned as error.

Whether or not the line in question was properly located was a question for the jury upon all the evidence in the case. Upon the facts stated in the bill of exceptions (No. 3), the ruling of the court was proper.

[3-5] The same witness, John Green, Brownlow Green, and Samuel Green were asked certain questions upon cross-examination by the defendant's counsel as to matters not connected, it is claimed, with their examination in chief. The action of the court in permitting such questions to be asked at that time is assigned as error.

The bills of exceptions upon which this assignment of error is based show that the said questions were objected to generally, but do not show upon what ground. The general rule unquestionably is that, if the party cross-examining wishes to examine a witness as to matters other than those stated in his examination in chief, he should do so by making the witness his own and calling him as such in the progress of the cause. 1 Greenleaf, § 445. But where the objection to the evidence is as to the time it is offered, the objection should so state. But even if that be done, the manner of examining witnesses is so largely in the discretion of the trial court that its action will not be reversed unless it has abused its discretion. 1 Greenleaf on Ev., §§ 431, 447; 2 Elliott on Ev., § 927.

[6] The refusal of the court to permit A. W. Hale, a son of Wm. Hale, to testify as to what the witness had heard his brother say with reference to where the line in controversy was located is assigned as error.

It does not appear that the person whose statement was sought to be proved was either a surveyor or chain carrier at the making of the original survey, or that he was the owner of the tract or of any adjoining tract calling for the same boundaries. It does not appear that he had been engaged as a processioner of the land, or that his situation was such in reference to the land as to render it his duty or his interest to make diligent inquiry and obtain accurate information as to the facts. It appears that he was living on the land at the time, but in what character is not stated. It is not stated that he was there as the tenant of Wm. Hale, or as a claimant for himself under any title; certainly it does not appear that he had that peculiar means of knowing the facts which would impress upon his unsworn statement the character of evidence in a subsequent controversy between others to whom he was entirely a stranger, about the title to the land. His statement under our decisions was properly rejected. Harriman *v.* Brown, 35 Va. 697, 712-713; Clements *v.* Kyles, 54 Va. 468, 478; Fry *v.* Stowers, 92 Va. 13, 14, 22 S. E. 500.

[7] There was evidence tending to prove that Wm. Hale, a former owner, had said that when he had his claim surveyed he did not survey all of it, but only had the "heads of the bottoms run out," as he did not wish to pay taxes on more land than he could farm. E. D. Sutherland, after stating that the land was hilly and rocky, was not permitted to answer whether it was "such land as a man running out the heads of bottoms for him a farm—a man who did not want to pay taxes on more land than he could farm—would include in his survey." This action of the court is assigned as error.

The answer sought was the opinion of the witness upon a matter which was clearly not the subject of expert evidence.

The action of the court in permitting certain questions to be answered by Mrs. Margaret Hale, as set out in bill of exceptions numbered 9, is assigned as error. When that bill of exceptions is considered in connection with bill of exceptions numbered 1, we do not think the court erred in permitting the evidence objected to, which it is true was somewhat indefinite, to go to the jury for what it was worth.

The court, as appears from bill of exceptions No. 10, refused to permit a surveyor named Raines, on cross-examination, to answer certain questions therein set out. The answers called for by the questions were the opinions of the witness. In passing upon the objection to that evidence and upon the motion of the defendant to exclude other evidence of like kind which had gone to the jury, the court sustained the objection and excluded all the opinion evidence of the surveyors who had testified in the cause, except their opinions as to the age of the marks on timber. The ruling of the court in excluding said evidence and the language in which its ruling was made is assigned as error.

While the language of the court is somewhat involved, it is clear, we think, that the jury must have understood from it that all the opinion evidence of the surveyors, except as to the age of the marks on timber, was excluded and must not be considered by them in arriving at their verdict. Neither do we think that the court erred in excluding the evidence objected to and asked to be excluded.

[8, 9] The action of the court in permitting E. T. Sutherland to testify as to an admission made by Wm. Green (through whom the plaintiff claims) as set out in bill of exceptions No. 11, and the refusal of the court to permit the same witness, upon cross-examination, to answer a question as to the habits of Wm. Green, as appears from the same bill of exceptions, are assigned as errors.

The question which the witness was permitted to answer tended to show that Wm. Green did not claim the lines in controversy where the defendant, his vendee, now claims them. The question which the court declined to permit the witness to answer sought the opinion of the witness as to whether Wm. Green would or would not have sold land in dispute. The ruling of the court upon each question was clearly proper.

[10] The court, as will appear from bills of exceptions numbered 12, 13, 14, 16, and 19, refused to exclude evidence tending to show that Rainwater Ramsey claimed the land now in controversy, and that he and those who claim under him exercised acts of ownership over the same, or portions thereof, by cut-

ting, using, and selling timber from it, clearing and cultivating portions of it, with the knowledge of and without objection on the part of Wm. Green.

This evidence was clearly competent as tending to show where both Ramsey and Green regarded the line between them, and also as tending to show adversary possession on the part of Ramsey and those who claim under him—even if the acts mentioned were not sufficient, as claimed by the plaintiff, to show title by adversary possession.

[11] The court permitted Reedy, a witness who had testified to a conversation between himself and Wm. Green (bill of exceptions No. 15), to be asked the following question: "He (Green) was then talking about the division line between him and Ramsey?" and his reply was, "Yes, sir." This question was objected to because leading, and because the statement of Green was made under a mistake.

[12] Ordinarily, permitting a leading question to be asked furnishes no ground for reversal—certainly not in this case, for it appears from what the witness had already stated that Green was talking about the division line. Whether his admission as to the location of that line was made under a mistake was a question for the jury, not for the court.

[13] The assignment of error based upon bill of exceptions No. 17 is to the action of the court in permitting the defendant to introduce in evidence a deed from Wm. Green to Willard, trustee. The deed shows upon its face that the land embraced in it is a portion of the two tracts of land owned by Wm. Green, as hereinbefore stated. There was evidence in the case tending to show that Wm. Green recognized and treated the southern boundary line of his land as correctly described in the Willard deed, and that the said southern boundary line was the Hale line, or a line treated by him (Green) and Ramsey as the true division line between them. If the line called for in the Willard deed was the boundary line between the lands of Ramsey and Green, then the land in controversy belonged to the Ramsey tract and the plaintiff could not recover it. The Willard deed, in this view of the case, was material evidence, and the court did not err in admitting it.

[14] The defendant was permitted to introduce in evidence a notation or indorsement on the margin of the deed from Warder to Wm. Green. The objection made to the introduction of said indorsement, as stated in substance in bill of exceptions No. 18, was that it was not proved to have been the act of Wm. Green. It was signed "Wm. X Green," and witnessed by J. F. Gilliam. J. F. Gilliam was dead. Three witnesses were placed

upon the stand to testify to his handwriting, with which they stated they were familiar. All of them were of opinion that the name of the subscribing witness was in his own handwriting, and his two of them thought that the words "Wm. X Green" were also mark in his handwriting. This was sufficient proof of the execution of the indorsement to render it admissible.

[15] Under the facts disclosed by bill of exceptions No. 20, we do not think that the court erred in refusing to permit the papers therein set out to go to the jury. The letters excluded were not written by or to the defendant, nor by or to any one under whom he claimed. Their contents, if relied on to show that the plaintiff was not withholding from the jury the title bond to the Green land, ought to have been proved orally or by deposition.

The court gave the following instructions:

Defendant's Instructions.

"(1) The court instructs the jury that the plaintiff can recover in this action only on the strength of his own title; that it does not matter whether the title of the defendants is defective or not, the question is not whether the defendants have title to the land in this suit mentioned, but whether the plaintiff has title thereto.

"(2) The court instructs the jury that the plaintiff must show the Warder title in himself and a present right of possession at the time of the commencement of this action before the defendants are called upon to show anything, and the party in possession is presumed to be the owner until the contrary is proved.

"(3) The court instructs the jury that the burden is on the plaintiff in this case to prove that the deed from George A. Warder to Rainwater Ramsey offered in evidence by the plaintiff in this case does not include the land in controversy; and, unless they do believe by a preponderance of the evidence in this case that the land in controversy is not included in said deed from George A. Warder to Rainwater Ramsey, they must find for the defendant.

"(4) The court instructs the jury that as a matter of law the use and occupancy of contiguous property by the respective owners thereof without disturbance for a sufficient length of time to show that the owners thereof knew their boundary lines will be sufficient evidence of an agreement between the parties to establish such line as the true boundary line between the parties, and if they take and hold possession up to that line the requisite statutory period, for at least 10 years, the possession thereof

will ripen into title and will preclude the parties and those holding under them from thereafter disputing the same.

"(5) The court further instructs the jury that in an action of ejectment a defendant, who is in the peaceable possession of land sought to be recovered, is entitled to hold the same against all the world except the true owner thereof.

"(6) The court instructs the jury that, where the boundaries are doubtful, actual occupation for a number of years up to the line whence the party supposed his land to extend, without objection from the adjoining proprietor, is strong presumptive evidence of the true place of the line.

"(7) The court instructs the jury that if in this case they believe that Rainwater Ramsey and those claiming under him were in possession for a number of years up to the northern line of the land in controversy to which they supposed their land to extend, without objection from William Green and those claiming under him, then that is strong presumptive evidence of the true location of the division line between the lands of Ramsey and Green."

Plaintiff's Instructions.

"(3, as amended) Where corner trees are called for, but not found, nor the place at which they stood located, then the lines running to and from such corner should be determined by the courses and distances called for in the deed, provided such courses and distances will run to the next located corner.

"(4) If such course and distance will not run to the next located corner, then distance must give way to course or course to distance according to the manifest intent of the parties and the circumstances of the case."

"(4) The court further instructs the jury that if they believe from the evidence that Warder, the common grantor, under which both complainant and defendant claims, conveyed to Rainwater Ramsey by deed the lands on the south side of the Billy Hale line, and that he subsequently conveyed to William Green the adjacent lands on the northern side of said Hale line, then, in order to determine in whom the title to the land in controversy is now vested, it is necessary for you to determine by a preponderance of the evidence the true location of the original William Hale line called for in the title papers of both complainant and defendant, and if you believe by a preponderance of the evidence that the land in controversy is located on the north side of the William Hale line, and that same was conveyed to Green by Warders and not previously conveyed by Warders to Ramsey, then you should find for the plaintiff."

Amendment to 4: "Unless you believe by a preponderance of the evidence that, after a dispute or controversy arose between

Ramsey and Green, the adjacent owners, as to the true location of the Hale line, they mutually agreed upon a location of the Hale line, and that in pursuance of said agreement each of the said adjacent owners, namely, Green and Ramsey, took possession, used, and occupied said land up to said agreed line for the statutory period of 10 years."

"(5) The court further tells the jury that if they believe from the evidence that William Green did not know during his lifetime where the Billy Hale line was located, but that he continued to claim title up to the said Billy Hale line, then he and those claiming under him are not estopped from now showing the true location of the said Billy Hale line and may claim up to said line wherever it may be actually located."

Amendment to 5: "Unless you further believe the parties did agree upon another line and each held possession up to said agreed line for a period of 10 years prior to the bringing of this suit."

"(7) The court further tells the jury that cutting timber is not sufficient act of ownership to amount to a disseisin or dispossession of the rightful owner; neither is a disclaimer of title by the true owner sufficient to divest himself of the legal title or defeat this action."

"(10) The court ells the jury that the law is that a disclaimer sufficient to divest an owner of title to lands can only be made by deed or in a court of record. In the case of disputed boundaries, the parties may agree upon a line, by way of compromise, and if they take and hold possession up to that line for the requisite statutory period, the mere possession will in time ripen to title.

"(11) The court tells the jury that fixed monuments, natural boundaries, and the topography of the country control over course and distance in locating the boundary of a deed."

The action of the court in giving these instructions except No. 7 and No. 11, offered by the plaintiff, is assigned as error, as is also the action of the court in refusing to give 25 other instructions as offered by the plaintiff

[16] Without attempting any detailed discussion of the numerous objections to the instructions given and to the action of the court in refusing to give those which were rejected, it is sufficient to say that, while some of the instructions given are not as full and as clear as it is desirable that instructions should be, yet when considered as a whole, as they must be, we think they fairly submitted the case to the jury. This being so, the court did not err in refusing to give the other instructions offered, even if they had stated, as many of them fail to do, correct propositions of law as applied to the facts of this case.

[17] The case was submitted to the jury on Saturday, and, being unable to agree upon a verdict, they were adjourned over until Monday.

Before retiring to their room on Monday to consider of their verdict, the court said to the jury: "Gentlemen: The court had thought he would sum up the evidence in this case, but after deliberation I have decided not to do so, but I will say that it is the duty of juries to agree if they can, that it is the duty of a juror or jurors not to hold out and be positive against the other jurors on controverted questions, unless he is convinced that he is right. But such juror or jurors should make concessions and try to agree with the others if he can possibly do so without violating his oath or his conscience."

This action of the court is assigned as error.

Not only was there no error in the court's direction to the jury as to their duty as jurors, but such direction was especially appropriate in this case, in which there had already been two mistrials because of the inability of the jurors to agree.

[18] Before agreeing upon their verdict, the jury returned to the courtroom, when one of them asked the court: "What possession would be sufficient for the jury to believe or find that the defendant was entitled to the land?" The court orally replied: "That if a man living upon his lands, or any part thereof, and claiming to the extent of his boundary and no part of it in the possession of any one else, his possession extended to the boundaries called for in his deed, and in this case if you believe from the evidence there was an express agreement between Ramsey and Green and the parties exercised acts of ownership up to this agreed line for a considerable period of time, this is sufficient to establish the line between the parties. If you believe there was an agreed line established by the parties as claimed by the defendant, and if you further believe there was no express agreement between the parties and neither party knew the exact location of the division line, yet if the parties, Ramsey and Green, claimed up to a certain line on each side and exercised ownership, cut the timber up to that line, and sold their lands up to that line, you have a right to come to the conclusion that there was a line established by the parties."

This action of the court is assigned as error, first, because the court's statement was not a reply to the juror's question, and, second, because it does not state the law correctly.

The court is of opinion that the statement of the court was an answer to the juror's question, and as applied to the facts of this case was substantially a correct statement of law.

Upon the whole case we are of opinion that the judgment of the circuit court should be affirmed.

Affirmed.

Note.

The decision in this case as to the action of the trial judge in

urging a verdict, seems to be in line with the authorities on this subject.

It is well settled that a trial judge is vested with a large discretion in conducting judicial proceedings, and he may properly admonish the jury as to the desirability, importance and their duty of arriving at a verdict, and may urge them to make every effort to do so consistent with their consciences. This is proper as having a tendency to bring about unanimity of opinion on full and free interchange of views and to prevent unnecessary mistrials. See 11 Am. & Eng. Enc. of Pl. & Pr. 304; 38 Cyc. 853; 46 Cent. Dig. col. 1898; 19 Dec. Dig., p. 1247.

It is proper for the court to urge as reasons for the rendition of a verdict, the time and expense involved in the trial, and the time and expense of a subsequent trial. Watson *v.* Minneapolis St. Ry. Co., 53 Minn. 551, 55 N. W. 742; Allen *v.* Woodson, 50 Ga. 538; Green *v.* Talfair (N. Y.), 11 How. Prac. 260; Nickles *v.* Seaboard Air Line Ry., 74 S. C. 102, 54 S. E. 255; Pierce *v.* Rehfuss, 35 Mich. 53; 11 Am. & Eng. Enc. of Pl. and Prac. 304; 38 Cyc. 1853; 46 Cent. Dig., col. 1898; 19 Dec. Dig. 1247.

The court may properly remind the jury of the number of times the case has been tried, and urge upon them the importance and necessity of arriving at a verdict. Owens *v.* Mo. Pac. Ry. Co., 67 Tex. 679, 4 S. W. 593; Niles *v.* Sprague, 13 Iowa 198; Strepay *v* Stark, 7 Colo. 614, 5 Pac. 111; Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830; 38 Cyc. 1853; 11 Am. & Eng. Enc. Pl. & Prac. 305; 46 Cent. Dig. col. 1898; 19 Dec. Dig., p. 1247.

After a jury had been out a day and a half, and reported that they had not agreed, the trial judge stated to them that he "wished them to decide the case; that this was the second trial of the case, and that they would be kept together until the end of the term unless they did; that the case was a perfectly plain one, and ought to be decided in five minutes after reading the instructions and applying them to the facts." Held, that a verdict thereafter rendered would not be disturbed. Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830.

It is proper to advise the jury that while they should not surrender any conscientious views founded on the evidence, they should lay aside mere pride of opinion, hastily expressed; that each juror should re-examine for himself the grounds of his opinion, and to consider the facts and existing differences in a spirit of fairness and candor, with an honest desire to arrive at the truth and with the view of arriving at a verdict. See Warlick *v.* Plonk, 103 N. C. 81, 9 S. E. 190; Phœnix Ins. Co. *v.* Moos, 81 Ala. 335, 1 Sou. 108; Gibson *v.* Minneapolis, etc., Ry. Co., 55 Minn. 177; 56 N. W. 686, 46 Am. St. Rep. 482; Pierce *v.* Rehfuss, 35 Mich. 53; Nickles *v.* Seaboard Air Line Ry. Co., 74 S. C. 102, 54 S. E. 255; Moore *v.* Cass, 10 Kan. 288; Scarlotta *v.* Ash, 95 Minn. 240; 103 N. W. 1025; 38 Cyc. 1854; 11 Am. & Eng. Enc. of Pl. & Pr. 304; 46 Cent. Dig., col. 1898; 19 Dec. Dig., p. 1247.

Where a jury, after having been out five hours, returned into court, and announced their inability to agree upon a verdict, it was held that instructions upon their duty as to reconciling their views and arriving at a verdict, if consistent with their consciences, rather than that the parties should be put to the trouble and expense of trying the case again, nothing being said to the prejudice of either party, were not erroneous. Pierce *v.* Rehfuss, 35 Mich. 53; 46 Am. Dig., Cent. Ed., col. 1901.

A jury returned into court, after having been out five days, and stated that they could not agree, and asked to be discharged. The court stated that "this is the third trial of the cause;" that on the first trial a verdict had been found, and the next time there had been a mistrial; that it now stands upon its third trial; that upon each occasion the trial had occupied the court for nearly a fortnight; that "it was very important there should be an end to this litigation, if practicable, and it was the duty of the jurors to cultivate a spirit of harmony, and to arrive at a verdict if they could." Held, not objectionable, as tending to prejudice the jury. Phœnix Ins. Co. *v* Moog, 81 Ala. 335, 1 South. 108; 46 Am. Dig., Cent. Ed., col. 1898.

It is not error to instruct the jury, after they have been out some twenty hours, that if one or two of their number differed in their views of the evidence from the others they should be induced not to surrender conscientious convictions, but to doubt the correctness of their own judgments, and inquire whether they were not mistaken. Gibson *v.* Minneapolis, St. P. & S. S. M. Ry. Co., 55 Minn. 177, 56 N. W. 686, 43 Am. St. Rep. 482.

Instructions to a jury that "the fact that a juror finds his judgment opposed to the judgment of a majority of the panel ought to induce him, as a reasonable man, so far to doubt the correctness of his own views as to weigh carefully the opinions of his associates, and the arguments and reasons on which they are founded, and if, upon due consideration, he is convinced that they are probably right, and he is in error, it is his duty to agree with them," are not erroneous. Ahearn *v.* Mann, 60 N. H. 472.

While the law contemplates that the jury shall, by their discussions, harmonize their views if possible, it does not contemplate that they shall compromise for mere purpose of an agreement. The court is not authorized to direct the jury to bring in a compromise verdict. 11 Am. & Eng. Enc. Pl. & Prac. 306 and cases cited.

Where a jury, being unable to agree, returned into court for further instructions, it was improper for the court to state to them that it was necessary for all or some of them to make concessions with a view to rendering a verdict. O'Neal *v.* Richardson, 92 S. W. 1117, 78 Ark. 132.

Furthermore, it is not proper to give an instruction censuring jurors for not agreeing with the majority nor to comment on the small amount involved or use language amounting to an expression of an opinion. 11 Enc. Pl. & Pr. 304; 38 Cyc. 853; 46 Cent. Dig., col. 1898; 19 Dec. Dig. p. 1247.

WASHINGTON-VIRGINIA RAILWAY CO. *v.* BOUKNIGHT.

Wytheville, June 13, 1912.

[8 Va. App. 647.]

1. Pleading and Practice—Declaration—Grounds of Complaint—Demurrer.—If a defendant desires a more particular statement of the grounds of complaint, his remedy is not by demurrer but by motion for a bill of particulars.

2. Carriers—Passengers—Negligence—Presumption — Declaration.—Where the relation of passenger and carrier exists, and there is a